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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 781

CLAUDE L. KYLES,

Petitioner,

vs.

JAMES W. ELWELL & CO., a corporation, G. HEYN & SONS, and INTERSTATE CONTRACTING CORPORATION, a corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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The judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the decision of the District Court was and is correct. There is no special or important reason for this Court to review that judgment, and the petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE.

On July 27, 1957 the petitioner, a longshoreman, was an employee of Interstate Contracting Corporation (an independent stevedoring contractor) and was engaged in moving cargo in the hold of a vessel with a fork lift truck. Some steel which the longshoremen had placed on this

truck tipped, thereby causing the plaintiff to fall off of the fork lift truck onto the floor of the vessel, to sustain a very minor injury which resulted in his losing two and six-sevenths weeks of work, for which he was paid compensation in the sum of $154.29 at the rate of $54.00 per week under the provisions of the Longshoremen's & Harbor Workers' Compensation Act.

The complaint was filed more than two years after the occurrence on the theory that the plaintiff is a seaman entitled to the benefits of the Jones Act. The defendants were James W. Elwell & Co., berthing agent of the vessel, G. Heyn & Sons, vessel owner and Interstate Contracting Corporation, the petitioner's employer. Benefit of the Jones Act was claimed as against all three of these defendants, but the motions for summary judgment pointed out that the complaint itself showed that plaintiff was a longshoreman both by definition and nature of his work, that he was not an employee of either Elwell or Heyn and that the Jones Act is inapplicable because that Statute gives a cause of action for negligence only in favor of seamen-crew members (who engage in navigation) and then only against their own employers. The District Court granted summary judgment in favor of the defendants Elwell and Heyn, and dismissed the complaint as to the petitioner's employer Interstate. The Petition for Certiorari does not seek review of the decision as to Interstate; and as to Elwell and Heyn the question presented for review is limited to "Whether a stevedore may sue a ship owner for personal injuries sustained on board ship under the Merchant Marine (Jones) Act, Sec. 20, 46 U.S.C.A., Sec. 688."

ARGUMENT.

Petitioner is not a Jones Act seaman; there is no conflict among the decisions of the lower courts on the question presented for review.

This case should never have been filed at all, much less accorded the dignity of a petition for certiorari. It involves only a minor accident on board a vessel which was being unloaded by an independent stevedore contractor, where the contractor had full charge of the operation, and in which there was no fault of the vessel or its personnel.

The petition for certiorari is inaccurate and misleading in the extreme:

1. The "Statement of the Case" asserts that a "load of steel tipped and fell upon him" (petitioner). This is not true, as shown by the petitioner's pleadings.

2. Under "Reasons for Granting the Writ" the petitioner asserts (p. 3) that the lower courts are in conflict on the question presented for review. An analysis of the cases cited by the petitioner demonstrates that this is inaccurate.

3. The Petition alleges (p. 8) that the Supreme Court has not decided the question presented for review. That assertion is also false.

Beginning at page 4 the Petition cites seventeen decisions for the proposition that the lower courts have been rendering decisions in direct conflict with each other on the question whether a longshoreman may bring an action under the Jones Act for personal injuries sustained aboard ship. These citations may be conveniently divided into

two categories: (a) twilight zone marine workers such as crews of dredges, oil-drilling vessels and miscellaneous craft who alleged in their complaints that they were crew members, wherein the facts were such as to allow the question of whether or not they were seamen to be submitted to a jury, and (b) accidents of longshoremen which occurred prior to the date that the Longshoremen's & Harbor Workers' Compensation Act (33 U.S.C.A. 901-942) went into effect in 1927, when the courts said that longshoremen were seamen under *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 47 S. Ct. 19 (1926), which case is no longer applicable.

It seems quite unnecessary to analyze the petitioner's citations relating to the borderline jury-made seamen because the petitioner *is* a longshoreman by definition in his complaint and the Longshoremen's Act has provided a compensation remedy in lieu of the Jones Act. There are no questions of fact as to petitioner's status such as were involved in those cases and in *Senko* v. *La Crosse Dredging Corporation*, 352 U. S. 370, 77 S. Ct. 415, at 417-418. But the authorities which petitioner cites for the proposition that *longshoremen* are Jones-Act seamen will now be mentioned and explained.

A laborer unloading sugar was injured September 11, 1926 so the *Haverty* case was applied in *American Sugar Refining Co.* v. *Nassif*, 45 F. 2d 321, 1 Cir. (1930).

A longshoreman injured on some date before January 9, 1927 was accorded Jones Act recovery in *W. J. McCahan* v. *Stoffel*, 41 F. 2d 651, 3 Cir. (1930).

Panama Agencies Co. v. *Franco*, 111 F. 2d 263, 5 Cir. (1940) held that in the Canal Zone, where the Longshoremen's Act was not applicable, a longshore-

man could recover under the Jones Act pursuant to the *Haverty* decision.

The petition for certiorari at page 7 says that *Hammond Lumber Co.* v. *Sandin*, 17 F. 2d 760, 9 Cir. (1927) "although decided in 1927 about the time that the Longshoremen's Act became effective, held that a stevedore is a seaman under the meaning of the Jones Act." Actually both the occurrence (precise date not shown in the opinion) and the decision (February 14, 1927) were *before* the Longshoremen's Act was passed by Congress (March 4, 1927).

Arthur v. *Compagnie Generale Transatlantique*, 72 F. 2d 662, 5 Cir. (1934) is another Canal Zone case and therefore inapplicable to the case at bar.

Kwasizur v. *Dawnic, S.S. Co.*, 25 F. S. 327, D.C.E.D. Penn. (1938) points out that the Jones Act gives the employee no rights against a third person, not his employer. The opinion does state that stevedores have been held to be entitled to benefits of the Jones Act by a somewhat artificial extension of the word seamen, but that *Uravic* v. *Jarka Co.*, 282 U. S. 234, 51 S. Ct. 111 (1931) was careful to point out that stevedores are not to be regarded as seamen on the particular vessel upon which for the moment they happen to be at work. We must also mention that *Uravic* v. *Jarka* which talked of longshoremen as Jones Act seamen was a case in which the injury occurred on July 13, 1926, prior to passage of the Longshoremen's Act, and the case no longer states the law as to longshoremen being seamen.

Braen v. *Pleiter*, 263 F. 2d 147, 2 Cir. (1959) is cited by the petitioner (p. 5) to show "conflict" of decisions as to status of marine workers. Petitioner

fails to cite the final decision of this Court in that very case (361 U. S. 129, 80 S. Ct. 247) which pointed out that the employee was a "mate", that his status as a seamen was not involved, that the only question was whether he was injured "in the course of his employment." The opinion of Mr. Justice Douglas as to seaman status is as follows, (80 S. Ct. at p. 249):

> "The injured party must of course have 'status as a member of the vessel' for it is seamen, not others who may work on the vessel (*Swanson* v. *Marra Bros.*, 328 U.S. 1, 4, 66 S. Ct. 869, 871, 90 L. Ed. 1045), to whom Congress extended the protection of the Jones Act."

The question presented for review has been settled by the United States Supreme Court.

The petition asserts at page 9 that a direct statement whether a "longshoreman may—or may not—proceed under the Jones Act for shipboard injuries can not be found," and petitioner brushes off *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 66 S. Ct. 869 (1946) with the comment that the longshoreman who was there denied Jones Act benefits received his injuries "while working on a pier—on shore." Now actually, under the Jones Act it makes no difference whether the accident occurs on shore or one navigable water, *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 63 S. Ct. 488 (1943). Even a casual reading of *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 66 S. Ct. 869 clearly reveals that *Haverty* no longer applies, that the Longshoremen's Act gave a compensation remedy for longshoremen and that longshoremen no longer have any rights under the Jones Act, afloat or ashore (66 S. Ct. at p. 871). Mr. Chief Justice Stone referring to the Longshoremen's Act in *Swanson* v. *Marra Brothers, Inc.*, said p. 871:

> "The Act thus excludes stevedores not members of the crew who are injured on navigable waters from recovering under the Jones Act as interpreted in the *Haverty* case."

Thus obviously the question presented for review has been decided by this Court. It was confirmed as recently as December 1959 by the opinion of Mr. Justice Douglas in *Braen* v. *Pfeifer Oil Transportation Co.*, 361 U. S. 129, 80 S. Ct. 247 at p. 249. Also, there is a point not mentioned in the Petition but likewise fatal to petitioner's arguments, namely, that the Jones Act provides for suit against the employer only, *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, 69 S. Ct. 1317 at 1321-1322 (1949).

CONCLUSION.

Petitioner is a longshoreman by his own definition and by the nature of his work; he had no navigational duties, was not a crew member; he petitions for a determination that the Jones Act applies to longshoremen, and his petition is pitched upon the proposition that lower court decisions are in conflict and that the Supreme Court has never decided the question presented for review. Those assertions in the petition are manifestly untrue. The opinion of the Court of Appeals in *Kyles* v. *Elwell, et al.*, 296 F. 2d 703, the case at bar, was a thorough, well reasoned decision which strictly followed the law as laid down in the applicable decisions of this Court. The Petition for Certiorari should be denied.

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